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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 225

HARRY ELEUTERI and EDWARD DANLEY,

Petitioners,

vs.

DAVID D. FURMAN, Attorney General of the State of New Jersey, and MARTIN J. QUEENAN, Burlington County Prosecutor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Supreme Court of New Jersey is reported in 26 N. J. 506, 141 A.2d 46; that of the Appellate Division of the Superior Court is reported in 47 N. J. Super. 1, 135 A.2d 491; that of the Chancery Division of the Superior Court in 43 N. J. Super. 303, 128 A.2d 473.

Jurisdiction

The petitioners seek to establish the jurisdiction of this Court under 28 U.S.C. Section 1257(3). Respondents contend that they have asserted no title, right, privilege or immunity subject to protection under Federal law.

Questions Presented

1. Whether this Court should grant a Writ of Certiorari in view of the established authority, affirmed in *Wolf* v. *Colorado* and *Irvine* v. *California*, that the introduction in a state trial of evidence illegally obtained by a state officer does not constitute a violation of Federal constitutional rights?

2. Whether this Court should consider alleged grounds of invalidity in the issuance of search warrants not raised below or determined adversely to the petitioners by the state courts as a matter of local law?

3. Whether the petitioners on the record are precluded from arguing that the law enforcement officers of New Jersey have as a deliberate plan fomented and encouraged illegal searches and seizures?

Counter-Statement of the Case

This is a brief in opposition to a petition for writ of certiorari to the Supreme Court of New Jersey. The petitioners, Harry Eleuteri and Edward Danley, seek review of the judgment in favor of Grover C. Richman, Jr., formerly Attorney General of New Jersey, and Martin J. Queenan, Prosecutor of Burlington County, New Jersey. David D. Furman, Attorney General of New Jersey, has been substituted for Grover C. Richman, Jr. (P12a).

On August 22, 1954, Trooper George Dann of the New Jersey State Police, upon his affidavit before Magistrate Charles C. C. Ellis of Chesterfield Township, Burlington County, secured search warrants for the dwelling houses of the petitioners in the City of Bordentown and in Mansfield Township, both in Burlington County, to seize there any materials or things used in connection with gaming in violation of N.J.S. 2A:112-3. Money, gambling slips

and other property were seized at both premises and introduced before the grand jury on the subsequent criminal complaints against the two petitioners.

Indictments were found charging both petitioners with violation of N.J.S. 2A:112-3. The petitioners then filed a civil action in the Superior Court of New Jersey, Chancery Division, seeking injunctive relief against the use of the materials thus seized in the trial of the indictments. The petitioners claimed that the searches and seizures were invalid and unreasonable under the Federal and State constitutions. On motion, summary judgment was granted by the Chancery Division in favor of the defendants. 43 N. J. Super. 303, 128 A.2d 473. The Appellate Division of the Superior Court affirmed this decision, 47 N. J. Super. 1, 135 A.2d 191 and was, in turn, affirmed by the Supreme Court of New Jersey. 26 N. J. 506, 141 A.2d 46.

The Supreme Court of New Jersey held that the search warrants had been illegally executed because the magistrate who had issued them was the magistrate of Chesterfield Township and lacked territorial jurisdiction to issue search warrants for nearby municipalities. The highest state court denied injunctive relief in a comprehensive opinion affirming the New Jersey rule that illegally seized evidence is admissible in a criminal trial if material and competent *per se*.

The petitioners assert here additional grounds of alleged invalidity of the search warrants. They claim for the first time that the search was unreasonable since the warrant was issued on hearsay rather than on personal information. They renew the objections decided against them in the New Jersey courts that the description of the things to be seized was inadequate because the wrong street address was given in one of the warrants and that no New Jersey statute authorized the issuance of search warrants.

The State court's judgment recognized the illegality of the search warrants on the single ground of the magistrate's lack of authority and should be affirmed in accordance with *Wolf v. Colorado*, 338 U. S. 25 (1949), and *Irvine v. California*, 347 U. S. 128 (1954), without regard to additional grounds of alleged invalidity of the search warrants.

ARGUMENT

POINT I

No substantial federal question different from that decided in *Wolf* v. *Colorado*, 338 U. S. 25 (1949) is involved in this case.

This Court is called upon by the petitioners to reopen and to overrule its established rule that a state court may admit evidence in a criminal trial illegally obtained by state law enforcement officers, without denying federal constitutional rights.

In *Wolf* v. *Colorado*, 338 U. S. 25 (1949) the Court held that the Fourteenth Amendment forbids unreasonable searches and seizures by state officers, but reaffirmed that use of evidence obtained from such searches and seizures in the state courts is not prohibited by the requirements of due process. According to the opinion of the Court, each state may decide for itself whether the constitutional right of freedom from unreasonable searches and seizures is to be enforced by the exclusionary rule of the federal courts (*Weeks v. United States*, 232 U. S. 383 (1914)) or by sanctions against the offending police officer.

In *Irvine v. California*, 347 U. S. 128, 135-36 (1954), this Court declared:

> "Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its

violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks* v. *United States*, 232 U. S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."

Wolf v. *Colorado* has again been reaffirmed in *Breithaupt* v. *Abram*, 352 U. S. 432 (1957). The petitioners present no constitutional right, any different from that asserted in *Wolf* v. *Colorado*.

POINT II

The additional grounds for asserting the illegality of the searches and seizures in this case should not be considered by this Court because they were determined adversely to the petitioners below or are raised for the first time on the petition for writ of certiorari.

The petitioners attack the validity of the search warrants issued by Magistrate CHARLES C. C. ELLIS of Chesterfield Township on several grounds. Throughout the litigation in the State courts the respondents conceded the illegality of the search warrants issued by Magistrate ELLIS for premises outside the territorial jurisdiction of his court (N.J.S. 2A:8-20, 21).

The Supreme Court of New Jersey ruled specifically that the search warrants were not void for want of a statute expressly authorizing search warrants in gambling cases. The highest court of the state likewise struck down the

objection that the papers and things to be seized were not described with sufficient explicitness. As to the apparent variance between the street number of the petitioner Danley's dwelling house at 52 E. Main Street, Mansfield Township and the address cited in the search warrant at 54 E. Main Street, Mansfield Township, the Supreme Court failed to rule conclusively. The New Jersey law thus remains that a search warrant for the wrong address is valid if the description is sufficient to apprise the police officer of the location: *In re Simon*, 13 N. J. Misc. 196, 177 Atl. 557 (Co. Ct. 1935).

The state courts' determinations of the lawfulness of the search warrants in all respects other than the magistrate's lack of authority are valid holdings on matters of local law, not in conflict with the interdiction of the Fourth and Fourteenth Amendments against unreasonable searches and seizures.

The petitioners claim for the first time on this petition for writ of certiorari that there was no showing of proper cause to believe that a crime was being committed because the State Trooper's affidavits upon which the search warrants were issued were founded solely on hearsay (Pb18-20). This point was not raised in the original or amended complaints and was not treated by the Supreme Court of New Jersey in its opinion. It should, therefore, not be considered here. *Edelman v. California*, 344 U. S. 357 (1953); *Shelley v. Kraemer*, 334 U. S. 1, 8-9 (1948); *Matheson v. Branch Bank of Alabama*, 48 U. S. (7 How.) 260 (1849).

This case, therefore, stands as a state court determination that evidence is admissible in a criminal trial if illegally obtained because of the lack of jurisdiction of the issuing magistrate. The opinion by Chief Justice WEINTRAUB in the Supreme Court of New Jersey emphasized that:

> "In sum total, for the purpose of this appeal, illegality is clear, but equally clear is the fact that the trooper in good faith attempted to comply with the applicable mandate of the Constitutions, Federal and State, that a magistrate's decision intervene between the police and the search." 26 N. J. at 509; 141 A.2d at 48.

POINT III

The petitioners may not argue that the law enforcement authorities of New Jersey have encouraged unreasonable searches and seizures.

The petitioners claim that they have asserted a cause of action within a possible exception to the general rule of *Wolf v. Colorado, supra*. In *Wolf* the Court implied that if the law enforcement authorities of a state affirmatively sanctioned unreasonable searches and seizures it might feel compelled to exclude the evidence thus procured from state courts. 338 U. S. at 28.

Whether or not this possible exception exists, the petitioners have failed to properly bring themselves within it despite their allegations. The petitioners pleaded on the amended complaint a conclusion without supporting facts that the citizens of New Jersey are exposed to systematic illegal searches and seizures. As a matter of state law, the Supreme Court and the Superior Court, Appellate Division, both held that the respondents' motion for summary judgment, which admitted all well-pleaded material allegations of the complaint, did not constitute an admission of the shocking and unsupported conclusion of a state policy of unlawful police incursions.

The petitioners were invited by the Supreme Court of New Jersey to explain what evidence was available to

support their allegations of willful infringement of the Fourth Amendment., That court declared:

> "At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Federal Supreme Court indicated in *Wolf* that it would intervene." 26 N. J. at 516, 141 A.2d at 52.

Similarly the Appellate Division of the Superior Court had noted:

> "Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule against suppression or exclusion of illegally secured evidence tends to encourage violation of the constitutional guarantee." 47 N. J. Super. at 25, 135 A.2d at 203.

Had the petitioners shown the Appellate Division or the Supreme Court of New Jersey some basis for this allegation, either court could have exercised its original jurisdiction and made findings as to the truthfulness of the allegations. *New Jersey Constitution of 1947*, Art. VI, Sec. 5, par. 3.

As noted above this case was decided on the present respondents' motion for summary judgment. Under New Jersey Revised Rules 4:58-3 the plaintiff may resist a motion for summary judgment by supporting his claim with affidavits. Therefore, the argument that the petitioners were deprived of their opportunity to prove the allegations in their complaints misrepresents New Jersey procedure. See *Judson* v. *People's Bank & Trust Co.*, 17 N. J. 67, 75, 110 A.2d 24, 28 (1954); *A. Kaplan & Son, Ltd.* v. *Housing Authority*, 42 N. J. Super. 230, 235, 126 A.2d 13, 16 (App. Div. 1956).

The attempt to assert the *Wolf* exception was rejected not because the New Jersey Supreme Court felt that it should not be followed but rather because under New Jersey procedure the petitioners failed to plead or to offer evidence to substantiate their claims. Therefore, the decision on this point was made on adequate nonfederal grounds and is not subject to review here. *Staub v. City of Baxley*, 355 U. S. 313 (1958); *Hammerstein v. Superior Court*, 340 U. S. 622, *cert. dismissed*, 341 U. S. 491 (1951); *Chappel Chemical and Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 465 (1899).

CONCLUSION

The respondents, David D. Furman, Attorney General of New Jersey and Martin J. Queenan, Burlington County Prosecutor, therefore pray that certiorari be denied.

Respectfully submitted,

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